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Fundamentalist Federalism: The Lack of a Rational Basis in United States v. Morrison

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INTRODUCTION

The term "federalism" can be defined in various ways, but it broadly refers to the theory of the need for, and the purposes served by, the separation of powers in the American political system.[2] As the Supreme Court has often noted, the federal government is one of "enumerated powers"; any power not specifically granted to the federal government in the Constitution is reserved for the states.[3] The traditional reason for this division is to prevent concentration of power in any one area, and to thereby "ensure the protection of our fundamental liberties"[4] and "reduce the risk of tyranny."[5] Other reasons include preserving the closeness of governmental bodies to their constituents, allowing local governments to experiment with social policy, and increasing the accountability of elected officials.[6]

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* J.D., Washington University School of Law, 2002. I would like to dedicate this Note to my husband, Christopher Jackson.

1. 529 U.S. 598 (2000).

2. For a discussion of the meaning of federalism by one of the current justices, see Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 2-3 (1985) (federalism is not "blind deference to 'States Rights'" but rather "sensitivity to the legitimate interests of both State and National governments" (quoting Younger v. Harns, 401 U.S. 37, 44 (1970)).

3. "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607. The Tenth Amendment states "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

4. 529 U.S. at 616 n.7 (quoting Atascadero State Hosp. v. Scanion, 473 U.S. 234, 242 (1985) (quoting Carcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

5. United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (internal quotation marks omitted)).

6. *See* Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825 (2000). For a full discussion of the history and sources of federalism, see Dennis M. Cariello, Note, *Federalism for the New Millennium: Accounting for the Values of Federalism*, 26

In addition to the separation of power between the state and federal levels of government, the Constitution also provides for separation of power among different branches within the federal level.[7] Early in its history the Supreme Court asserted its role as the branch of government charged with the duty to interpret the constitutional limits of federal authority.[8] However, the Court's use of federalist doctrine has varied over time, reflecting changes in the composition of the Court and in the political, social, and economic situation in the country. The Court's Commerce Clause jurisprudence depicts this variance most clearly.[9] The Court has not only used various tests to assess the limit of Congress' authority under the Commerce Clause, but in doing so, the Court has also varied the extent to which it will allow Congress to determine for itself whether those limits have been reached.[10] Federalism therefore encompasses questions of the proper balance of power both between the states and the federal government, and between the political and judicial branches within the federal government.

The Rehnquist Court has made judicial enforcement of federalist limits on congressional authority a priority in virtually all areas of constitutional law,[11] and has asserted its power in the federal system

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FORDHAM URB. L.J. 1493 (1999).

7. The "written Constitution . . . further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of Legislative power limited only by public opinion and the legislature's self-restraint." 529 U.S. at 616 n.7.

8. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In *Morrison*, the Court acknowledged the tension between the political and judicial branches in this regard, but reaffirmed that the Supreme Court is the higher authority: "No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text." 529 U.S. at 617 n.7.

9. "The Congress shall have Power: To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cls. 1, 3. The Court's "interpretation of the Commerce Clause has changed as our Nation has developed." 529 U.S. at 607. For an extreme example of change in Commerce Clause analysis in response to political and economic pressure, see *infra* note 24.

10. For an overview of the concept of judicial deference, see Robert A. Chapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000).

11. *See* H. Geoffrey Moulton, Jr., *The Quixotic Search for Judicially Enforceable Federalism*, 83 MINN. L. REV. 849 (1999) (providing a historical background for, and an examination of, the Court's modern federalism). For an overview of the areas of law affected by

to a great, even excessive, extent.[12] In *United States v. Morrison*,[13] the Court determined that Congress had exceeded both its Commerce Clause power and its Fourteenth Amendment Equal Protection power[14] by enacting the civil rights remedy of the Violence Against Women Act of 1994 (VAWA),[15] which allowed victims of violent crimes motivated by gender to sue their attackers in federal court.[16] In holding this section of VAWA unconstitutional, the Court was willing to override four years of congressional, state and private research into the scope of, and proper remedies for, the national problem of violence against women in pursuit of its ideal of federalism.[17]

This Note will argue that the Supreme Court is currently utilizing an inherently fundamentalist concept of federalism, which enunciates an inflexible rule based on outdated historical precedent, and which is not realistically responsive to the needs of modern society. In

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the Rehnquist Court's emphasis on federalism, as well as a strong criticism of its motives, see Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37 (1999). The Court is "animated by the right-wing political agenda" and has accomplished "a revolution in constitutional jurisprudence . . . in the name of federalism." *Id*. Other commentators have predicted that certain areas of congressional power will not be much affected by the Court's federalism. *See* Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629 (2000) (predicting that the federal spending power can be an alternate basis of authority for federal action).

12. These developments have prompted considerable academic commentary. *See generally* Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, The Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967 (2000) (arguing that the Court has adopted a more political, legislative role by asserting a strong judicial power, and explaining the effect of this development on lower federal courts); Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 401-02 (1999). "[I]t is no longer unreasonable to regard the Court less as a court of law . . . and more as a political institution openly and primarily engaged in making policy." *Id*.

13. 529 U.S. 598 (2000).

14. "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

15. 42 U.S.C. § 13981 (1994).

16. The statute begins by declaring that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). It then provides that a person committing a crime motivated by gender "shall by liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief . . . ." 42 U.S.C. 13981 (c). *See infra* text accompanying notes 82-97.

17. *See* S. Rep. No. 103-138 (1993); *infra* text accompanying notes 82-97.

Morrison, the Court ignored vital national policy concerns in favor of preserving "areas of traditional state regulation"[18] without adequately analyzing the original functional purposes of the constitutional separation of powers. This Note will also argue that the Court could have upheld the civil remedy in VAWA under either Congress's Commerce power or its Equal Protection power. The Court could have done so if it adopted a more realistic and functional view of federalism, not only in terms of the modern need for separation of powers between the federal government and the states, but also in terms of its own authority to limit the power of the federal government.

Part I of this Note presents the historical background for the Court's Commerce Clause and Fourteenth Amendment analysis in *Morrison*. This background includes the dual issues of the limits on federal power and which branch of government should determine those limits. Part II presents the legislative history and congressional findings of VAWA. Part III analyzes the Court's reasoning in *Morrison*, and the impact of the Court's federalism on its decision. Part IV concludes by discussing the extent to which federalism is still vital to the American system of government, and the conceptual changes necessitated by modern reality.

I. HISTORICAL BACKGROUND

A. The Commerce Clause

1. Pre-*Lopez*

One can briefly summarize the early history of the Commerce Clause because the history most relevant to the Court's holding in *Morrison* began in 1995 with its decision in *United States v. Lopez*.[19] In the early nineteenth century, the Marshall Court defined the Commerce power broadly,[20] but later decisions curtailed it. These

18. 529 U.S. at 615.

19. 514 U.S. 549 (1995).

20. In *Gibbons v. Ogden*, Chief Justice Marshall rejected the argument that the word "commerce" should be read literally to mean "traffic" in "commodities"; rather, commerce "describes the commercial intercourse between nations, and parts of nations, in all its branches,

later cases identified categories of activities which were either non-commercial by definition, regardless of their economic impact,[21] or had only an "indirect" effect on interstate commerce and were therefore not subject to federal control.[22] The rationale for these frequently strained formulations was the prediction that without such categorical limitations on the definition of interstate commerce, Congress would be able to regulate virtually anything pursuant to the Commerce Clause and the balance of power between the states and the federal government would be lost.[23]

In the mid-1930s, the pressing need for federal legislation to ease the country's economic crisis and President Roosevelt's scheme to change the composition of the Court led the Court to abandon both its categorical exclusion of certain activities from "commerce" and its distinction between "direct" and "indirect" effects on interstate commerce.[24] In 1937, the Court formulated a simpler test for whether

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and is regulated by prescribing rules for carrying on that intercourse." 22 U.S. (9 Wheat.) 1, 189-90 (1824). The debate about how broad Marshall's concept of the Commerce Clause really was continues in the Court's *Morrison* opinion. *See* 529 U.S. at 616 n.7.

21. For example, in *United States v. E.C. Knight Co.*, the Court considered the application of the Sherman Anti-Trust Act of 1890 to the manufacture of sugar. The Court held that it could not apply the Act to the acquisition of a monopoly in manufacturing, because "manufacturing" was not "commerce," and such application was therefore outside the scope of Congress's enumerated powers. 156 U.S. 1, 17 (1895). Similarly, in *Carter v. Carter Coal Co.*, the Court invalidated the Bituminous Coal Conservation Act of 1935 by differentiating "mining" from commerce, because mining was part of production and commerce could only concern the movement of goods which had already been produced. 298 U.S. 238, 303-04 (1936).

22. *See, e.g.*, Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act of 1933 unconstitutional; Congress could not regulate the hours and wages of employees in a local business because the effect on interstate commerce was indirect, and Congress only has power over activities that directly affect interstate commerce); *Carter*, 298 U.S. 238 (1936).

23. *See, e.g.*, *Schechter*, 295 U.S. at 548. "If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect on interstate commerce," then "there would be virtually no limit to federal power and for all practical purposes we should have a completely centralized government." *Id.*; Nat'l Labor Relations Bd. v. Jones & Laughlin, 301 U.S. 1, 99 (1937) ("stating [a]lmost anything—marriage, birth, death—may in some fashion affect commerce") (McReynolds, J., dissenting). This argument is also the primary rationale the Rehnquist Court has given to explain its recent decisions.

24. The Court's decisions in cases such as *Schecter* and *Carter* were invalidating President Roosevelt's New Deal legislation. The Court was thus frustrating Congress' attempts to bring the country out of the Great Depression. In response, President Roosevelt introduced the "court-packing" plan, designed to add additional justices to the Supreme Court. While Congress debated the plan, the Supreme Court abruptly began to uphold New Deal legislation.

an activity, even an intrastate activity, could be regulated by Congress: if such an activity bore a "substantial relation" to interstate commerce, it was within the power of Congress under the Commerce Clause.[25] Under this new standard, Congress could regulate any activity, including intrastate activities, which had either direct or indirect effect on interstate commerce.

With this new, inclusive and flexible definition of the commerce power, the Court entered a sixty year period of upholding federal Commerce Clause legislation. During this period, the broadest construction of the commerce power included, within the constitutional scope of federal regulation, any intrastate private activity which, in the aggregate, affected the market for goods in interstate commerce.[26] This "aggregate effects" test exceeded any prior conception of Congress' commerce power, and between 1937 and 1995, the Court upheld all challenged federal Commerce Clause legislation.[27]

Beginning with the *Jones & Laughlin* case, Congress abandoned the court-packing scheme and the number of Supreme Court Justices remained at nine. This series of events is the origin of the phrase "the switch in time that saved the nine."

25. Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The case concerned the National Labor Relations Act of 1935, which prohibited employers from engaging in certain labor practices; in particular, it concerned the applicability of the Act to employees engaged in "production," a category specifically excluded from commerce by earlier decisions (including *Carter*, which was decided a year before *Jones & Laughlin*). The Court upheld the law in *Jones & Laughlin*, stating that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." 301 U.S. at 37.

26. Wickard v. Filburn, 317 U.S. 111 (1942). The case concerned the application of federal limits on the amount of wheat grown for market under the Agricultural Adjustment Act of 1942, to a farmer growing wheat for his own private use. The Court held that federal limits on the amount of wheat grown for market included wheat grown for home consumption, because "[h]ome-grown wheat . . . competes with wheat in commerce." *Id.* at 128. Moreover, the Court held that the fact that the individual's "own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal legislation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-28.

27. The one exception to this statement is the *National League of Cities* case, which the Court subsequently explicitly overruled less than ten years later. *See infra* notes 34-35. The Court upheld all other statutes challenged during this period. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that the Civil Rights Act of 1964 is a valid exercise of the Commerce power); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) (upholding the Surface Mining Control and Reclamation Act of 1977 as valid

A struggle, however, developed during this period that ultimately culminated in the *Lopez* decision. Initially, the Court simply insisted that there were limits to the authority granted to the federal government under the Commerce Clause,[28] even though the Court was consistently finding that Congress had not exceeded those limits. In addition, although the Court was giving Congress wide latitude in determining whether an activity affected interstate commerce, there was increasing judicial scrutiny of the Congressional record for Commerce Clause legislation.[29] The Court mixed its standard "judicial deference" language with a requirement that Congress have a "rational basis" for determining that a regulated activity substantially affected interstate commerce,[30] and that the means Congress chose to regulate the activity be "reasonably adapted" to the goal of regulating commerce.[31]

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under the Commerce Clause).

28. *See, e.g., Jones & Laughlin,* 301 U.S. at 30. "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction . . . between commerce 'among the several States' and the internal concerns of a State." *Id*.

29. Although the Court was stating it did not require that "Congress need make particularized findings in order to legislate," it was nonetheless judging the adequacy of those findings. Perez v. United States, 402 U.S. 146, 156 (1971). In *Katzenbach v. McClung*, another case challenging the Civil Rights Act of 1964, as it applied to a local restaurant whose only connection with interstate commerce was that it purchased food sold in interstate commerce, the Court noted that although Congress made no formal findings, the congressional record is "replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants." 379 U.S. 294, 299 (1964). For a discussion of how extensive the judicial scrutiny of congressional records has become and its negative effects, see A. Christopher Bryant and Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001).

30. The "rational basis" standard began in *Katzenbach*, 379 U.S. at 304. The standard initially was an expression of the court's deference to congressional findings. *See Hodel,* 452 U.S. at 277 (stating "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational"). Even in *Hodel*, however Justice Rehnquist's interpretation of the rational basis requirement was more assertive of judicial power. In his concurring opinion, he emphasized the importance of this judicial scrutiny. 452 U.S. at 311 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.").

31. During this period, the Court often tempered its assertions of the tests, such as the "rational basis" and "means/ends" tests, that it could use to limit congressional power with more deferential language:

> [T]his is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject to only one caveat—that the means chosen by it must be reasonably adapted to the end permitted

Most importantly, concerns about state autonomy began to surface. At first, these concerns were limited to dissenting opinions,[32] but in the mid-1970s, after changes in the composition of the Court,[33] a divided Court briefly invalidated a federal statute for exceeding Congressional authority under the Commerce Clause.[34] Less than ten years later, however, the Court overturned this ruling, indicating its deep division as to the proper limits on Congressional power and the proper role of the Court in determining those limits.[35] By this time, federalism clearly emerged as the battleground for the divided Court and the dissenting Justices indicated that they would change the law again if they regained a majority.[36] Thus, by the time of the *Lopez* decision in 1995, the uniformity of the results in Commerce Clause cases, which had upheld virtually all federal legislation for more than sixty years, belied the signals of another impending change in the Court's treatment of the Commerce Clause.

2. The *Lopez* Decision

The *Lopez* case involved a challenge to the Gun-Free School Zone Act of 1990, which made possession of a firearm in a school zone a

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by the Constitution.

Heart of Atlanta Motel, 379 U.S. at 261-62.

32. *See* Maryland v. Wirtz, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting).

33. President Nixon appointed Chief Justice Rehnquist to the Supreme Court in 1972.

34. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976). The Court held that the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938 could not be applied to employees of state and local governments, because employment decisions are a traditional government function necessary for "the States' 'separate and independent existence.'" *Id.* at 851 (citing Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).

35. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). The Court held that the Fair Labor Standards Act of 1938, the same statute which had been held unconstitutional in *National League of Cities*, could be applied to a local government transit authority.

36. There were three separate dissenting opinions. Justice Powell stated that although "the Court's opinion purports to recognize that the States retain some sovereign power, it does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation." *Garcia*, 469 U.S. at 579 (Powell, J., dissenting). Justice O'Connor used even stronger language: "The Court today surveys the battle scene of federalism and sounds a retreat." *Id.* at 580 (O'Connor, J., dissenting). Finally, Justice Rehnquist predicted the Court's return to strict federalism: "I do not think it incumbant on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." *Id.* at 580 (Rehnquist, J., dissenting).

federal criminal offense.[37] In finding the statute unconstitutional, the Court began with a detailed history of Commerce Clause jurisprudence, emphasizing that even the broadest prior interpretations of the Commerce Clause included some limits on Congress's commerce power.[38] The Court noted its duty to enforce these limits by applying the "rational basis" test. The *Lopez* version of this test, however, differed from earlier enunciations, in that it seemed to indicate the Court should not decide whether Congress had a rational basis for concluding that an activity substantially affected[39] interstate commerce, but should instead conduct an independent review of congressional findings in order to determine whether a rational basis *actually existed*.[40]

After determining that the statute at issue did not directly regulate either the "channels" or the "instrumentalities" of interstate commerce, the Court discussed whether the statute properly regulated an activity "substantially related" to interstate commerce.[41] Most significantly, the court characterized prior valid Commerce Clause legislation as dealing with "economic activities," and noted that

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37. 18 U.S.C. § 922(q)(2)(A) (1990).

38. "But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." 514 U.S. at 556-57.

39. In previous cases, the Court had been somewhat inconsistent in its use of the "substantially affects" test; some cases simply asked whether the activity "affected" interstate commerce. The *Lopez* court noted this inconsistency and settled the matter in favor of the "substantially affects" test. *See Lopez,* 514 U.S. at 559.

40. Compare the Court's statement in *Lopez* that it must "decide *whether a rational basis existed* for concluding that a regulated activity sufficiently affected interstate commerce," 514 U.S. at 557 (emphasis added), with an earlier statement in *Katzenbach v. McClung*: "But where we find that the legislators, *in light of the facts and testimony before them*, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." 379 U.S. 294, 303-04 (emphasis added). In *Lopez*, the Court shifted from the previous subjective standard articulated in *McClung* to an objective standard.

41. After analyzing the history of Commerce Clause jurisprudence, the *Lopez* Court identified three categories of legitimate congressional authority under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

514 U.S. at 558-59.

possession of a gun in a school zone was not an economic activity.[42] The consequence of this distinction between "economic" and "noneconomic" activities was that the *Lopez* Court formulated new factors to determine whether Congress could regulate a non-economic activity pursuant to its Commerce power.

In determining that the statute was an unconstitutional regulation of a noneconomic activity, the Court noted several factors. The statute was not an essential part of a larger regulation of economic activity.[43] The statute contained no jurisdictional element that would require a case-by-case showing of effect on interstate commerce.[44] Finally, in enacting the statute, Congress made no findings that the Court could use to evaluate whether the activity substantially affected interstate commerce, and no affect was visible "to the naked eye."[45]

The Court was less explicit about the importance of other aspects of its analysis. The Court repeatedly noted that the statute was a "criminal statute."[46] In addition, while the Court clearly retained the "aggregate effects" test from prior Commerce Clause jurisprudence, it seemed to apply this test only to economic activities. These are important distinctions because they allowed the Court to reject the governments primary arguments in support of the constitutionality of the statute: the "costs of crime" and "national productivity" arguments.[47]

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42. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567.

43. *Id.* at 561.

44. *Id.*

45. *Id.* at 563.

46. "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' . . . ." *Id.* at 561.

47. 514 U.S. at 564. The "costs of crime" argument in this context was that since possession of a firearm may result in violent crime, and since violent crime will, in the aggregate, substantially affect the nation's economy by increasing insurance costs and reducing the willingness of citizens to travel to parts of the country where crime is a problem, Congress should be able to regulate it in order to protect interstate commerce. The "national productivity" argument was that interstate commerce depends on the education of the country's citizens, and therefore Congress should be able to regulate crime in school zones. In the Gun Free School Zone Act context, these justifications seem very tenuous. However, the Court's per se rejection of these arguments in *Lopez* led to a similar per se rejection of them in *Morrison*, although both arguments were much stronger in the VAWA context.

The Court used federalism to justify its rejection of these arguments and its formulation of a new Commerce Clause analysis.[48] The Court stated that if it were to uphold the statute, it would "be difficult to perceive any limitation on federal power,"[49] even in such areas of traditional state sovereignty as education and criminal law enforcement.[50]

The *Lopez* decision raised many questions among commentators and lower courts. Some commentators predicted the case would be an isolated example of judicial activism, a reprimand directed at Congress for failing to compile a legislative history. Others warmly welcomed the Court's return to its "duties" in preserving federalist limits on congressional power.[51] In particular, many commentators were speculative about the future of VAWA's civil rights remedy in the wake of *Lopez*.[52] However, for the most part, lower courts were reluctant to interpret *Lopez* too broadly, and they upheld the VAWA's civil remedy.[53]

The Fourth Circuit changed this trend when, in 1999, it invalidated the VAWA's civil rights remedy. This holding offered the Supreme Court a chance to clarify some of the confusion surrounding

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48. The Court itself, in both *Lopez* and *Morrison*, does not acknowledge that it departed from prior Commerce Clause decisions.

49. 514 U.S. at 564.

50. *Id*.

51. Steven G. Calabresi, "*A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995) (praising the Court's "revolutionary" return to federalism after having been "'asleep at the constitutional switch' for more than fifty years" (quoting *Expansion Checked*, WALL ST. J., Apr. 27, 1995, at A14)).

52. *See* Troy Robert Rackham, Note, *Enumerated Limits, Normative Principles, and Congressional Overstepping: Why the Civil Rights Provision of the Violence Against Women Act is Unconstitutional*, 6 WM. & MARY J. WOMEN & L. 447 (2000) (predicting that the Supreme Court would find the VAWA unconstitutional after *Lopez*); *see also* Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849 (1997) (arguing that even after *Lopez*, the VAWA is a valid exercise of Congress' commerce power); Melinda M. Renshaw, Note, *Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act*, 47 EMORY L.J. 819 (1998). For the opinion of the drafter of the provision, see Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1 (2000).

53. *See, e.g.*, Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (holding that the VAWA is constitutional even after *Lopez*). *But see* Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999) (finding the VAWA unconstitutional under *Lopez* and following Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820 (4th Cir. 1999)).

the application of *Lopez*, particularly on the subject of judicial scrutiny of legislative findings.[54]

B. The Fourteenth Amendment Equal Protection Clause[55]

Unlike the Commerce Clause analysis in *Morrison*, which was almost entirely controlled by a very recent case, the Court's Fourteenth Amendment analysis in *Lopez* relied primarily on two cases from the late nineteenth century, *United States v. Harris*[56] and the *In re Civil Rights Cases*.[57]

In *Harris*, the Court found unconstitutional a section of the Civil Rights Act of 1871 which made it a federal crime for "two or more persons" to deprive any person of the equal protection of the laws or of equal privileges under the laws.[58] The Court interpreted the Fourteenth Amendment to require state action, and since the statute applied to private persons without reference to any state law or act by any state official, the statute exceeded Congress' Fourteenth Amendment Equal Protection power.[59]

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54. There was considerable confusion on this issue, as well as the proper scope of judicial review, within the lower court decisions leading up to *Morrison*. For a detailed description of the lower courts opinions, see Jil L. Martin, Note, United States v. Morrison*: Federalism Against the Will of the States*, 32 LOY. U. CHI. L.J. 243 (2000) (providing an in-depth analysis of the different opinions); *see also* Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in* Brzonkala v. Morrison, 75 N.Y.U. L. REV. 150 (2000) (discussing the Fourth Circuit's analysis in *Brzonkala*, particularly regarding the Fourteenth Amendment).

55. For a detailed Fourteenth Amendment history, see Renshaw, *supra* note 52. For the text of the Fourteenth Amendment, see *supra* note 14.

56. 106 U.S. 629 (1882).

57. 109 U.S. 3 (1883).

58. 106 U.S. 629.

59. This reasoning follows from a statutory interpretation of the Fourteenth Amendment. Since section 1 refers only to action by a state and section 5 grants to Congress only the power to enforce "the provisions of this article," it follows that Congress can only pass laws which target state action under its Equal Protection power. U.S. CONST. amend. XIV, §§ 1, 5. As the *Harris* Court described it:

> The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, and no more. The power of the national government is limited to this guaranty.

106 U.S. at 639.

In the *Civil Rights* cases, the Court considered the Civil Rights Act of 1875, which first declared that all persons have a right to equal enjoyment of public establishments and further proscribed federal penalties for "any person" who denied someone this right.[60] The Court expanded its justification for the "state action" doctrine[61] expounded in *Harris*: because this statute also applied to private persons without a showing of state action or complicity, the statute was not a valid use of Congress' Equal Protection power.[62]

In later cases, the Court broadened the state action doctrine,

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60. 109 U.S. at 9. Note that Congress is now able to proscribe this precise conduct via its Commerce Clause power. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (denial of access to public inns and restaurants substantially effect the movement of people in the economy). Compare this argument with the *Lopez* Court's rejection of the "costs of crime" and "national productivity" arguments. *See supra* text accompanying note 47. For the *Morrison* Court's similar rejection, despite much greater and more persuasive evidence, see *infra* text accompanying note 104.

61. The *Civil Rights* Court's definition of "state action" requires some attention. The definition includes the sentence: "State authority in the shape of laws, *customs*, or judicial or executive proceedings." 109 U.S. at 17. However, the issue of a state supported "custom" is not explored further in the subsequent cases, nor in the *Morrison* opinion. Yet, the issue of "custom" is an intriguing concept within the context of gender bias in state courts and law enforcement that are targeted in VAWA.

62. *The Civil Rights* opinion further explains the interaction between the Fourteenth Amendment, the Tenth Amendment and the need for the state action doctrine as a limit to Congress' Equal Protection power. It is worth recounting in full because of its relevance to the statute at issue in *Morrison*:

> If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? . . . . The truth is, that the implication of a power to legislate in this manner is based upon the assumption that *if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action*. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively.

109 U.S. at 14-15. Thus, although the power to deny equal rights under the laws in the Fourteenth Amendment is "prohibited by" the Constitution to the States, the Constitution also does not grant the federal government the authority to "legislate generally" on the subject of rights which should be guaranteed to all persons by both private individuals and the states. Federalist concerns are clearly the basis for this rationale: if Congress were allowed to guarantee equal protection of the laws to all people, whether the threat be public or private, "it is difficult to see" where Congress' power "is to stop."

particularly in the context of the Civil Rights Movement in the 1960s. In *United States v. Guest*,[63] a case specifically relied on by Congress in asserting its authority to enact the civil rights remedy in VAWA,[64] the Court upheld the criminal provisions in the Civil Rights Act of 1964.[65] The provisions were used by the federal government to remedy the failure of certain southern states to convict white citizens for crimes committed against blacks. In *Guest*, private individuals were charged with violating the civil rights of black citizens, primarily by beating and murdering them.[66] Although the statute targeted private individuals, without requiring any state action, the Court *inferred* state action from the particular indictment, which alleged that the private individuals charged had also harassed black citizens by making false reports to state officials, resulting in the false arrest of the black citizens by the state.[67]

In addition, there was language in *Guest* which, while maintaining the state action requirement of previous Equal Protection cases, suggested a broad reading of the Fourteenth Amendment, primarily by asserting that "the involvement of the State" need not be "exclusive or direct."[68] This language was later interpreted in passing

63. 383 U.S. 745 (1966).

64. S. REP. NO. 103-138, at 55 n.72 (1993).

65. 18 U.S.C. § 241 (1999). Interestingly, this conspiracy statute was amended in 1996 to include greater penalties for a conspiracy involving "aggravated sexual abuse." *Id*. Given the facts of the *Morrison* case, see *infra* note 97, the U.S. government can now bring federal criminal charges against perpetrators of similar crimes, but after the *Morrison* decision, the victim cannot sue in federal court.

66. Note that this statute provides for federal criminal penalties for acts already criminalized by the states. The statute's purpose was to remedy the state's failure to prosecute, investigate, and obtain convictions (largely due to all-white juries) for these crimes. This rationale is similar to that underlying the Equal Protection justification for the civil rights remedy in VAWA, in the context of unequal treatment of women in both civil and criminal courts. *See infra* text accompanying notes 82-97. Neither statute requires a showing of state action; the basis is an underlying assumption of the failure of the state legal process.

67. 383 U.S. at 756. Note that the Supreme Court, rather than focusing its constitutional analysis solely on the challenged statute, was willing in this case to examine the particular facts of the case. For an argument that the current Court no longer considers itself an appellate court in this sense, but rather focuses solely on the political issues of the case presented, see Bhagwat, *supra* note 12.

68. 383 U.S. at 765. There was even stronger language in the concurring opinions:

> Section 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus

in *District of Columbia v. Carter*,[69] another case specifically cited by Congress in the VAWA record.[70] In *Carter*, the Court again reiterated the state action requirement, but noted that the requirement did not prevent Congress from targeting the action of private individuals as a way to remedy state action.[71]

A final case involving congressional regulation of private action under the Equal Protection clause was *Griffin v. Breckenridge*.[72] The case involved another section of the Civil Rights Act of 1964, which provided for a *civil* cause of action under federal law for a black citizen denied equal protection of the laws by any two or more persons.[73] A unanimous Court upheld the statute. In discussing the lack of state action in the case, the Court implied that the federalist concerns behind the state action requirement were not present in the challenged statute.[74] The law was not a "general federal tort law" because of the jurisdictional requirement of racial "discriminatory

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> fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.

Id. at 782 (Harlan, J., concurring). Justice Harlan went on to speak to issues of federalism, noting that a stricter reading of the Equal Protection Clause "reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary; and it attributes a far too limited objective to the Amendment's sponsors." *Id.* at 783. There "now can be no doubt that the specific language of [section 5] empowers the Congress to enact laws punishing all conspiracies – with or without state action – that interfere with Fourteenth Amendment rights." *Id.* at 762 (Clark, J., concurring).

69. 409 U.S. 418 (1973).

70. S. REP. NO. 103-138, at 55 n.72 (1993).

71. "The Fourteenth Amendment itself 'erects no shield against merely private conduct, however discriminatory or wrongful.'" 409 U.S. at 423 (citing Shelley v. Kraemer, 334 U.S 1, 13 (1948)). The Court then qualified this statement: "This is not to say, of course, that Congress may not proscribe purely private conduct under [section 5] of the Fourteenth Amendment." 409 U.S. at 424 n.8.

72. 403 U.S. 88 (1971). This case, cited by Congress in the legislative history in VAWA, was not even addressed by the *Morrison* Court.

73. 42 U.S.C. § 1985(3) (1998).

74. 403 U.S. at 96-97. The Court noted that though the language in the challenged statute was similar to that in the Equal Protection Clause, there is "nothing inherent *in the [statute]* that requires the action working the deprivation to come from the State." *Id.* at 97 (emphasis added). The Court went on to examine the legislative history for evidence of congressional intent to include private action within the scope of the statute, which it found. *Id.* at 102. Thus, the *Griffin* Court apparently saw no contradiction between the Fourteenth Amendment "state action" requirement and the power of Congress to legislate generally on equal protection, if it clearly intended and was otherwise authorized to do so. *Id.*

animus."[75] However, the Court's decision ultimately rested on the fact that Congress had independent authority to enact the law.[76]

Later Equal Protection cases addressed issues of whether Congress could validly authorize suits against a state,[77] and to what extent Congress could abrogate state sovereign immunity.[78] These cases are not directly relevant to the *Morrison* decision except that they demonstrate how the federalist standard of the Rehnquist Court impacted its *analysis* of the Equal Protection Clause. As with the Commerce Clause, the Rehnquist Court's federalism has resulted in increased judicial scrutiny of congressional findings in the Fourteenth Amendment context. The Court has asserted the importance of the Fourteenth Amendment in preserving the balance of power between the judicial branch and the legislative branch.[79] Under this analysis, the Court is obligated to apply both a "factual basis" test and a "means-ends" analysis to Congressional findings that a given remedial action is appropriate.[80] The Court's current emphasis on the sufficiency of congressional findings, and the judiciary's power to make an independent assessment of those findings, is therefore applicable to the Equal Protection Clause as well as to the Commerce Clause.

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75. *Id.* at 102. *See infra* text accompanying notes 82-97 for Congress' specific inclusion and definition of a "gender animus" requirement in the civil rights remedy in VAWA.

76. Specifically, under the Commerce Clause and the Thirteenth Amendment. 403 U.S. at 105-07. The *Morrison* Court did not even reach the idea of independent authority to enact the VAWA provision; it found the absence of state action conclusive. *See infra* text accompanying notes 117-20.

77. The Eleventh Amendment provides that federal courts may not have jurisdiction over suits against a state by citizens of another state. U.S. CONST. amend. XI. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that the Eleventh Amendment does not bar suits against the states under the Civil Rights Act of 1964, since the Eleventh Amendment is limited by Congress' power under the Fourteenth Amendment).

78. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act of 1967 could not validly abrogate state sovereign immunity because it was not a valid exercise of Congress' power under the Equal Protection Clause).

79. City of Boerne v. Flores, 521 U.S. 507, 523-24 (1997). "The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary." *Id*.

80. *Id.* at 528-30. There must be a "proportionality or congruence between the means adopted and the legitimate ends to be achieved." *Id*. at 532.

II. THE VIOLENCE AGAINST WOMEN ACT

The VAWA was first introduced to Congress in 1990.[81] In the four years between the bill's initial introduction and its eventual passage, Congress undertook a detailed investigation of violence against women, and gathered reports from the Justice Department, twenty-one states, and various private organizations.[82] Additionally, it held extensive hearings which included testimony of survivors of rape and domestic abuse, federal and state law enforcement officials, legal experts, and academics.[83] The legislation that emerged from this process was a comprehensive attempt to remedy the "epidemic of violence against women."[84]

Title III of the VAWA was entitled "Civil Rights," and provided a federal civil remedy for victims of gender-motivated violence by allowing the victims to sue their attackers in federal courts.[85] Congress based Title III on its power under both the Commerce Clause and the Equal Protection Clause.[86] In support of its authority

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81. S. REP. NO. 101-545, at 29 (1990).

82. The statistics that emerged from these studies were staggering:

> Every week, during 1991, more than 2,000 women were raped, and more than 90 women were murdered–9 out of 10 by men. . . . [Gender-motivated] violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings and cancer deaths combined. As many as 4 million women a year are the victims of domestic violence. Three out of four women will be the victim of a violent crime sometime during their life.

S. REP. NO. 103-138, at 38 (1993).

83. S. REP. NO. 103-138 (1993). For a detailed history and analysis of the development of the VAWA, see Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

84. S. REP. NO. 103-138, at 38. The VAWA increased federal criminal penalties for repeat offenders, provided for mandatory restitution for victims, changed the Federal Rules of Evidence to protect victims of sexual violence, increased federal spending for a variety of federal and state programs designed to help victims of gender-related violence and created a Justice Department Task Force to continuously evaluate these efforts. *Id.* at 42-48.

85. 42 U.S.C. § 13981 (1994). Some commentators argue that this provision was inadequate and unworkable, regardless of whether or not it was constitutional. *See* Daniel G. Atkins et al., *Striving for Justice with the Violence Against Women Act and Civil Tort Actions*, 14 WIS. WOMEN'S L.J. 69 (1999); Christopher James Regan, Note, *A Whole Lot of Nothing Going On: The Civil Rights "Remedy" of the Violence Against Women Act*, 75 NOTRE DAME L. REV. 797 (1999). Some of the problems with using the civil remedy have more to do with the general difficulty of getting victims of gender-based violence to come forward than with an inadequacy of the remedy.

86. S. REP. NO. 103-138, at 54-55 (1993).

under the Commerce Clause, Congress found that gender-based violent crime restricts the free movement and participation of women in the economy, increases health expenditures, and reduces consumer spending.[87] In support of its Equal Protection power, Congress found that the state remedies offered to women were inadequate to protect them from gender-motivated violence, primarily because state officers and judges treat these crimes less seriously than other violent crimes, and because of a persistent bias against women in state juries.[88] It compared the civil rights remedy in VAWA to other federal civil rights remedies, noting that the Court upheld those prior laws on similar grounds.[89]

Early on, issues were raised regarding the constitutionality of the VAWA's civil rights remedy. Notably, Chief Justice Rehnquist questioned the remedy's validity while Congress was still developing VAWA.[90] Congress adjusted Title III before enacting it to specifically acknowledge and address these concerns.[91] In particular, the congressional record emphasized the limiting jurisdictional factor of gender-motivated crime, noting that the Court's decision in *Griffin* allowed federal jurisdiction for analogous causes of action if they were predicated on a discriminary purpose.[92] Congress also excluded certain areas of traditional state concern, such as divorce and child custody, from federal jurisdiction altogether, and provided for concurrent jurisdiction in state courts of the suits authorized by the

87. "For example, women often refuse higher paying night jobs in service/retail industries because of the fear of attack. Those fears are justified: the No. 1 reason why women die on the job is homicide." *Id.* at 54 n.70.

88. *Id.* at 41-42. The Report cites the "reluctance on the part of [state] government to interfere to protect women" in domestic situations, the frequent failure of state police to arrest abusers, the persistence of various states laws proscribing different penalties for assault or rape of a spouse, and the failure of state criminal and civil justice systems to provide fair trials for victims of rape or domestic abuse. The actual statistics are again astounding: over sixty percent of rape cases do not result in arrests, less than half of those arrested for rape are convicted, and over one-half of those convicted spend less than a year in prison. *Id.* at 42.

89. "This was precisely the rationale on which the Supreme Court relied in upholding the 1964 Civil Rights Act with respect to race (and presumably, sex as well)." *Id.* at 54-55.

90. For a detailed examination and criticism of Chief Justice Rehnquist's role in affecting the legislative process, see Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000).

91. *See* Nourse, *supra* note 83.

92. S. REP. NO. 103-138, at 51. This factor is the one which may actually render the remedy unworkable for victims of domestic violence. *See* Atkins, *supra* note 85.

civil remedies provision.[93]

Overall, Congress anticipated judicial scrutiny of the legislative record for the civil remedy, and therefore detailed its purpose and findings, including citing its sources of legal authority.[94] It reminded the Court, somewhat ironically, of the Court's "rational basis" standard.[95] It recognized the "means-ends" test as well, including reasons why it believed the means chosen were reasonably adapted to the goals of the legislation.[96] In the end, however, these congressional efforts were wasted, since the Supreme Court asserted its authority to completely disregard them, and it did so in the name of federalism.

III. THE *MORRISON* DECISION[97]

The majority opinion in *Morrison* includes a recitation of traditional federalism, including the historical purposes of the separation of powers, such as securing the people's rights,[98] and preserving a distinction between "what is truly national and what is truly local."[99] Nowhere is there any indication that the Court considered whether such purposes would be better served by upholding or striking down the civil remedies provision of the VAWA. The Court makes no mention of the fact that thirty-eight states filed amicus briefs *on behalf* of the statute's constitutionality.[100] Throughout the opinion, the concept of federalism is simply one of an automatic rule.

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93. S. REP. NO. 103-138, at 50-52.

94. "Because many questions have been raised regarding title III, this section provides an extensive discussion of the committee's purpose in creating a civil rights remedy for gender-motivated violent crimes." *Id.* at 48.

95. *Id.* at 54.

96. *Id.* at 55 (concerning the Court's possible means/ends analysis under the Equal Protection Clause: "Title III is 'appropriate' legislation [because] . . . it provides a necessary remedy to fill the gaps and rectify the biases of existing State laws").

97. Brzonkala, a student at Virginia Tech, was raped by two fellow students. For a detailed case history, see Brzonkala v. Virginia Polytechnic and State Univ., 935 F. Supp. 772 (1996). Note that the involvement of a state university and the university's failure to respond to Brzonkala's complaints could have been used to infer "state action" in her particular case. *See supra* text accompanying 66-67.

98. 529 U.S. 598, 616 n.7 (2000).

99. *Id.* at 617-18.

100. *See* Martin, *supra* note 54.

A. The Commerce Clause

The Court based its Commerce Clause analysis on the factors identified in *Lopez*;[101] in so doing, it further restricted both the *Lopez* criteria and the standard of review the Court would use in its Commerce Clause analysis. It began by confirming the importance of the distinction between "economic" and "noneconomic" activities.[102] The Court found that gender-motivated crime, like possession of a firearm in a school zone, was not an economic activity.[103] It also confirmed that the "aggregate effects" test only applied to economic activities,[104] and it repeated the *Lopez* implication that "violent crime" cannot be regulated by Congress under this test, regardless of the magnitude or national scope of the particular crime.[105] It then analyzed the VAWA civil remedies provision using the *Lopez* factors for federal regulation of a noneconomic activity.

The Court characterized the other *Lopez* factors as: (1) the presence or absence of a jurisdictional element, (2) the strength of any legislative findings in support of congressional authority, and,

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101. 514 U.S. 549 (1995).

102. 529 U.S. at 610 ("a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case").

103. *Id.* at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

104. *Id*. at 611. Technically, the Court did not "adopt a categorical rule against aggregating the effects of any noneconomic activity," but it noted that in its opinion, the aggregate effects test had never previously been applied to noneconomic activity. *Id.* at 613. What the Court did do, however, was categorize the civil remedies provision as a regulation of "crime." Moreover, it rejected the "costs of crime" reasoning in the VAWA context because if such an argument were accepted, it "would permit Congress to regulate all violent crime." *Id.* While it is presumably fair to doubt that the Court would deny itself the power to make a distinction between a pattern of crime so pervasive as to have an impact on the national economy, and random criminal activity, since the Court did not address the *magnitude* of the problem addressed by VAWA, as compared with that in *Lopez*, the functional result of its analysis is a categorical denial of Congress' power to regulate noneconomic activity under the commerce clause. To a much greater degree than the firearm possession in *Lopez*, which did not even address crime that had already happened, the cost of gender-motivated violence is demonstrable on a national scale. The Court had to reject a "cost of crime" argument outright in order to ignore the size of the problem addressed in VAWA. The goal of the civil remedy was to provide a more effective mechanism for victims to recover damages directly from their attackers, which, if utilized, would reduce the burden on the national economy.

105. The Court repeatedly refers to the civil remedy as regulating criminal behavior, although it is not a criminal statute: Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id*. at 617.

most importantly, (3) the degree of connection between the activity and a substantial effect on interstate commerce.[106] This last factor is vital, because it represents a return to the "direct" effects test which has historically proven unworkable[107] and which, at least in the context of noneconomic activities, cannot be aggregated to measure their effect on interstate commerce. This development calls into question a variety of Congressional legislation that has been in effect for decades.

The Court noted that VAWA's civil remedy lacked a jurisdictional element[108] and went on to address the congressional findings. The Court then, very simply, rejected the entire congressional record by declaring that Congress' method of reasoning was faulty. The Court's rationale was that it had already rejected "cost of crime" and "national productivity" arguments, two arguments on which Congress relied, in its *Lopez* decision.[109] The words "rational basis" were mentioned nowhere in this very brief analysis.

Thus, the Supreme Court altogether avoided any examination of the magnitude of the problem of gender-motivated violence as well as any functional analysis of whether the problem would be more easily addressed at a national or local level of government. The Court avoided these issues by simply declaring that a noneconomic activity

106. *Id.* at 611-12. The Court describes the "attenuated" link between gun possession and a substantial effect on interstate commerce.

107. *See supra* text accompanying notes 24-25.

108. Interestingly, the Court observed that other provisions of the VAWA were criminal statutes which did have a jurisdictional element, such as 18 U.S.C. § 2261(a)(1), which provides federal penalties for anyone crossing a state line to commit domestic abuse against a spouse or a partner or anyone who commits domestic abuse "during interstate travel." 529 U.S. at 614 n.5. The Court notes with seeming approval that this provision has been "uniformly upheld" by lower courts. *Id.* It is strange to think that the Court's concerns over federalism can be so easily assuaged and at the same time so staunch when it comes to federal regulation lacking this technicality. The impact on interstate commerce of people crossing state lines to commit gender-motivated violence, when examined in isolation, must be a very small portion of the overall impact on the economy of domestic violence in general. Nonetheless, the Court confirms that the line-crossing renders this portion of the problem subject to federal control, but the overall, much larger problem of domestic violence must be handled by the states alone. This conclusion demonstrates how very literal and categorical the Court's federalism and Commerce Clause analysis is.

109. 529 U.S. at 612-13.

could never be brought within Congress' Commerce power solely because of the size of its impact on the national economy. The Court justified its refusal to examine the actual problem by stating that if it accepted the "cost of crime" or "national productivity" arguments, Congress would become uncontrollable and would have the power to regulate other areas of "traditional state regulation," including "marriage, divorce, and childrearing."[110]

The dissenting opinions in *Morrison* contested both the Court's Commerce Clause analysis and its level of judicial review, particularly the absence of the "rational basis" standard.[111] The dissent, for the first time in the decision, discussed Congress's findings on the magnitude of the problem of gender-motivated violence.[112] Additionally, the dissent called into question the fundamentalist concept of federalism used by the majority,[113] evaluated the underlying values of federalism,[114] and mentioned the "practical reality" of expanding federal authority as the country becomes more closely intertwined.[115]

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110. That the Court could at once be so confident in asserting its judicial authority over Congress in the name of federalism, and at the same time so insecure about its ability to limit Congress in the future, would be very puzzling if the Court's justifications were taken at face value. A more plausible view is that the *Morrison* decision demonstrates that the Rehnquist Court will go to extraordinary lengths in pursuit of its version of federalism.

111. 529 U.S. at 628 (Souter, J., dissenting):

> The fact of such a substantial effect is not an issue for the courts in the first instance, (internal citation omitted) but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours . . . . The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact.

Id. The dissent went on to conclude that the majority had supplanted rational basis scrutiny with a new standard of review, one that depends on "a uniquely judicial competence." *Id.* at 638.

112. *Id.*

113. *Id.* at 639. "The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur." *Id.* The dissent also acknowledged the role of the states in support of the statute. *Id.* at 653.

114. 529 U.S. at 661 (Breyer, J., dissenting) ("I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake.").

115. *Id*. at 660 (Breyer, J., dissenting).

B. The Equal Protection Clause

A similarly fundamentalist approach was taken by the *Morrison* majority in its Fourteenth Amendment analysis. The Court applied the "state action" rule mechanically and, as it did in its Commerce Clause analysis, with little practical analysis of the underlying problem. Citing *Harris* and the *Civil Rights* cases, the Court discerned the "time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."[116] It dismissed the language in *Guest* and *Carter* as "naked dicta."[117] Although it acknowledged that the Court in *Guest* implied state action from the facts of the particular case, the *Morrison* Court did not itself consider whether state action could be implied either in the particular case before it or from the overall congressional record.[118] The Court did not even address the *Griffin* decision.[119]

In fact, in response to the argument that Congress had specifically found gender-based disparate treatment by state authorities, the Court, rather than address the congressional findings, concluded that even if the findings of state action were accurate, the civil remedy provision would still be invalid because the means employed by Congress were insufficiently adapted to the desired ends. This conclusion was simply another reiteration of the literal state action requirement, however, because the Court, in passing judgment on the type of remedy offered, went no further than noting that the statute was not aimed at a "culpable state official."[120] As with its Commerce Clause analysis, the result of the Court's Equal Protection analysis was a categorical denial of a type of federal action: under *Morrison* in

116. *Id*. at 621.
117. *Id* at 624.
118. *Id.*
119. Under *Griffin*, the Court might have considered whether Congress had an independent constitutional basis for enacting the civil remedy in VAWA. One alternative basis might have been international law. *See* Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power*, 22 HOUS. J. INT'L L. 209 (2000). Another alternative might have been the Nineteenth Amendment. *See* Sarah B. Lawsky, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783 (2000).
120. 529 U.S. at 626.

the Equal Protection context, Congress may not target private individuals as a method of remedying state action.[121]

Again it is only in the dissenting opinions that a functional, problem-oriented approach takes place. One dissenting opinion asks a simple question: "But why can Congress not provide a remedy against private actors?"[122] The only answer found in the majority's opinion is "just because."

IV. CONCLUSION

The *Morrison* decision vividly demonstrates that the Rehnquist Court practices fundamentalist federalism. It applies federalism as an inflexible doctrine without analysis of the specific goals and problems involved in the legislation before the Court.[123] The Court's refusal to examine the underlying problem of gender-motivated violence in its determination to assert absolute limits on federal power indicates an unwillingness to address the conditions of modern society. Moreover, that the Supreme Court could so readily disregard the democratic process inherent in legislative action is itself violative of federalist doctrine, the ultimate goal of which was to guarantee the people's right to self-govern.[124]

This argument is not to say that the civil rights remedy of the VAWA would have worked, or that it was necessarily constitutional merely because it emerged from a lengthy legislative process. It is not to say that the Court lacks the authority to inquire into congressional purposes and findings or to invalidate federal legislation. But in doing so, the Court must consider the practical implications of the problem before it. The Rehnquist Court's concept of federalism is

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121. For a discussion of the validity of this per se rule, see Evan H. Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351 (2000).

122. 529 U.S. at 665 (Breyer, J., dissenting).

123. For a discussion of the Court's failure to analyze the VAWA provision as a civil rights statute, see Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000) (author was one attorney arguing in support of VAWA's constitutionality before Supreme Court).

124. *See* Lino A. Graglia, *The Revitalization of Democracy Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165 (2000) (arguing that the American system can be made more democratic by decentralizing policymaking and limiting the policymaking power of judges).

fundamentalist not because it is wrong, but because it prevents the Court from looking any further into an issue than is necessary to apply traditional rules. The values of federalism are not irrelevant to modern society, but these values find little expression in the Court's absolutism.

If a more functional and realistic approach to the values of federalism had been applied, the Court could have determined the existence of a national problem requiring federal action. Moreover, because the means chosen by Congress were limited to providing an alternative to state remedies, instead of supplanting state authority, the practical threat to state sovereignty was minimal. The statute merely provided victims of gender-motivated violence a choice. The Court's use of federalist doctrine to deny citizens an additional option for protecting their civil rights is problematic at best.

The *Morrison* majority mentioned the idea that federalism requires a distinction between problems that are "truly national" or "truly local." The *Harris* and *Civil Rights* cases took place within twenty years of the Civil War, a time about which it might validly be said that almost no problem could have been considered "truly national." The simple fact is that today many more problems are "truly national" than in the past.[125] Some of these national problems may encompass areas that the states used to handle by themselves. But this fact alone should not cause the Court to end further analysis of the issues involved.

The fundamentalist approach to federalism exhibited by the majority on the *Morrison* Court is impractical and irrational, and, as the dissent in *Morrison* pointed out, should not "prove to be enduring

125. Concerning the federalization of crime in particular, there are certain crimes, such as rape, which are declared morally and legally wrong by every state in the nation. There can be no issue here, as there might be for other crimes, of the states' freedom to experiment with social policy. Yet, a victim in one state might be better protected than another, or a perpetrator more leniently penalized, depending on where in the country the crime was committed. Some crimes can be labeled national crimes if the people, as a nation, universally proscribe them. Were it not for our history of federalism, a nationalized, uniform system for penalizing these crimes, which could bring federal resources to bear, might be considered an option. This option, of course, goes far beyond any suggestion made so far in this Note, but conceptually it is difficult to see why the "people's rights" are better protected by having criminal penalties and procedures vary throughout the nation, at least when the underlying wrong is nationally condemned.

law."[126] Hopefully, it will be replaced by a more functional view, capable of discerning how the interests protected by federalism are affected by a particular problem and judging accordingly.

126. 529 U.S. at 654 (Souter, J., dissenting).